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IN THE

Supreme Court of the United States

October Term, 1964

No. 912

In the Matter of

AZURE HILLS CLUB, INC.,

Bankrupt

OLYMPIC FINANCE CO.,

Petitioner,

vs.

THOMAS R. THYRET, Trustee in Bankruptcy for Azure Hills Club, Inc., Bankrupt,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement of the Case.

We have no hesitancy in adopting the summary of the facts of this case as set forth in the Opinion of the Court of Appeals for the Ninth Circuit. Respondent will not for that reason present its own Statement of the Case in this brief. (App. I of Petition pp. 2-4.)

Before turning to a discussion of the points raised by petitioner, however, we would like to point out certain misstatements made by petitioner in its "Statement of the Case", and its obvious attempt to editorialize

the facts. For example, on page 6 of the Petition, we find the following:

> "Sometime prior to August 29, 1960, a loan broker acting as agent for Azure [the bankrupt] approached Olympic [the petitioner] for a loan to ease Azure's financial plight. He presented to Olympic a proposal to make a $75,000.00 secured loan to Azure and Riverside Commissary Inc. ('Commissary', hereinafter) an affiliate of Azure. *This proposition was rejected by Olympic* [Stipulation Re Reopening Petitioner's Case, etc. R. 12-16]."

An examination of the stipulation referred to shows that it was entered into for the sole purpose of introducing into evidence, over the objection of the trustee, a further document, and that the stipulation was entered into on the statements from counsel for petitioner to counsel for the respondent as to who prepared the document and at whose request. [Record 12-13.] There is no evidence in the record to support the quoted statement of the petitioner herein.

Petitioner in editorializing its "Statement of the Case" makes the following statement regarding the very transactions involved in the Agreement of August 29, 1960 (hereinafter referred to as the "Agreement"), before the court and the intent of the parties in executing such Agreement:

> "It was the intent of the parties to keep the two transactions carefully separated. This is borne out by all the evidence on the subject including a stipulation of the parties." (Petition, p. 8.)

Again, no authority is cited to support this statement. The intent of the parties in executing the Agreement was an issue of fact and this issue was decided adversely to petitioner.

Petitioner, even in its "Questions Presented", takes liberties with the facts. For example, the following statement is made:

> ". . . Nevertheless, the Referee determined that the basic underlying agreement accomplished a novation between the parties, inconsistent with the recital; that title to equipment theretofore leased to the bankrupt passed to the bankrupt then already in dire financial embarrassment; and that petitioner was left with a *worthless unsecured obligation* in lieu of its legal title to the equipment leased to the bankrupt." (Emphasis added—Petition, pp. 2-3.)

Petitioner would have the court ignore the fact that Azure was obligated to pay it over $100,000.00 pursuant to the Agreement of August 29, 1960 [Ex. F.] and that pursuant to that Agreement, Azure executed a chattel mortgage on substantially all the personal property involved herein. [Ex. I.] In addition, petitioner further ignores the fact that Azure and a stranger to the original transactions, Riverside Commissary, Inc., pursuant to the Agreement, secured petitioner's promissory note [Ex. G] by executing deeds of trust on their respective parcels of real property. Payment of all sums owed to petitioner under the Agreement was subject to "provisions regarding prepayment, penalties for delinquent payments and early payments" as set forth in the note secured by the Trust Deeds. [Ex. F, p. 3.]

Petitioner would have the Court rectify its business judgment in entering into the Agreement which is the subject of this litigation because of the events occurring subsequent to the execution of the Agreement.

Petitioner's Statement of the Case is truly not a statement of the case, but only an argument for its position in this matter.

ARGUMENT.

The issues in the present case are uniquely narrow ones, and do not warrant review by this Court on certiorari. This case was resolved on the basis of its own facts according to the law of the State of California, and will affect no others than the parties. Petitioner in order to receive another hearing exaggerates the importance of this case to create an issue for review, but no amount of editing of the facts of this case can create an issue which would bring it within the standards set forth in Rule 19 of this Court for the granting of a writ of certiorari.

The precedental impact of the Circuit Court of Appeals' Opinion will not disturb the "financial community" as argued by the petitioner, for the reason that the Court's Opinion is based on the peculiar facts of the case. (App. I of Petition, pp. 8-9.) Also, there are no considerations of public policy here involved to warrant the granting of the writ of certiorari for which the petition is made.

I.

The Decision Below Is Clearly Correct.

The Court of Appeals in its Opinion states that the California Courts have found the existence of a novation on the basis of a particular factual setting, rather than any governing legal precedent, and that whether a novation exists will depend primarily upon the individual facts of each case. (App. I of Petition, p. 7.) For example, the California Supreme Court in *Alexander v. Angel,* 37 Cal. 2d 856, 236 P. 2d 561 (1951) stated:

> "While the evidence in support of a novation must be 'clear and convincing' . . ., the 'whole question is one of fact and depends upon all the facts and circumstances of the particular case' . . ., with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions," *Id.* at 860-61.

As set forth in the Opinion of the Court of Appeals, the facts of each case are determinative of whether there was a novation. The trier of facts made a finding that there was a novation and that the rights and obligations of the parties were replaced by new ones pursuant to the Agreement.

Petitioner would have the Court ignore the difference of the rights and obligations of the parties prior and subsequent to the execution of the Agreement. The Court of Appeals after contrasting the respective rights and obligations of the parties before and after the exe-

cution of the agreement which extinguished the old obligations and created new ones, concluded:

> "Although no one of the above factors, standing along, might be sufficient to turn a contractual revision into a novation, when all are considered as a unit in contrasting the rights and obligations of the parties prior to the escrow agreement, and after it, the intent of the parties as evidenced by the agreement would reasonably appear to be to extinguish the former obligations, and to replace them with a new set." (App. I of Petition, pp. 8-9.)

Despite the fears of the petitioner that the decision in this case may be a "harbinger of a body of federal bankruptcy law of contracts out of harmony with the law of contracts of the State of California" (Petition, p. 3), no such horrendous conclusion can be drawn from the Opinion of the Court of Appeals. Petitioner exaggerates the impact of the ruling in this case when it implies that the decision will affect attempts to "rehabilitate debtors in distress", and that the "financial community" might act in reliance thereon. It requires no great legal acumen to make certain that there be no question of "novation." All that the drafter of a document needs is a provision setting forth specifically that the new agreement does not contemplate an extinguishment of the old obligation or the creation of a new one. The failure to so provide in the provisions of the documents in the instant case and the conduct of the parties under the Agreement evidently impressed the Referee, the District Court and the Court of Appeals. It ill-befits the petitioner at this juncture to create a monster for the purpose of arousing groundless fears.

II.

An Appeal Based on the Hope That an Appellate Court Will Second-Guess the Trial Court Does Not Warrant the Exercise of the Supreme Court's Power of Supervision.

A reading of the Court of Appeals' Opinion shows how carefully the Court considered and reviewed the facts of the case at bar. Petitioner's contention that it was deprived of the full scope of appellate review is without merit. The basis of petitioner's argument is that when the credibility of witnesses is not passed upon by the trier of facts, an appellate court should ignore the decision of the trial court and hear the case *de novo*. This is clearly not the law where conflicting inferences may be drawn from the established facts by reasonable men and the inferences drawn by the trial court are those which could have been drawn by reasonable men.

Lundgren v. Freeman, 307 F. 2d 104, 113-115 (9th Cir. 1962);

Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 289-291 (1960).

The purpose of judicial review should not be used to encourage appeals that are based on the hope that an appellate court will second-guess the trial court. Petitioner attempts, for the third time, to have a court decide the merits of this case in its favor by granting a trial *de novo*.

Even if it be assumed that there is a conflict between petitioner and respondent as to the proper scope

of judicial review and the application of the "clearly erroneous" rule where the trial court has not judged the credibility of witnesses, the decision below should be affirmed in the absence of any disclosure in the record that a mistake has been committed. In this case, the Court of Appeals in affirming the lower court's decision did not find that a mistake had been committed, a standard for reversal promulgated by this Court in *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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